

# Michigan Journal of Race and Law

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Volume 7

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2001

## Direct Measures: An Alternative Form of Affirmative Action

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### Recommended Citation

Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1 (2001).  
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# DIRECT MEASURES: AN ALTERNATIVE FORM OF AFFIRMATIVE ACTION

Daria Roithmayr\*

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\* Associate Professor of Law, University of Illinois College of Law. My thanks to the participants in the faculty brown-bag series at the University of Illinois College of Law. Special thanks to Cheryl Harris, who suggested that I find an alternative affirmative action program that could navigate the space between Proposition 209, Title VI and the Equal Protection Clause. Special thanks also to Kim Forde-Mazrui, whose important work pushed my thinking in what I hope is a productive and useful direction. See *infra* note 31.

*In this essay, I will propose an alternative form of law school affirmative action that does not rely on racial classifications, but nevertheless helps to remedy racial discrimination, to diversify the educational environment and to provide resources for underserved communities. In particular, I propose a "direct measures" program that would grant admissions preferences on the basis of the following criteria: (1) whether an applicant has suffered from the effects of racial discrimination; (2) whether, on issues of racial and social justice, the applicant can contribute a perspective or viewpoint not currently represented within the majority of the student population, and (3) whether the applicant is likely to provide resources or services to underserved communities. Because this form of affirmative action does not rely on racial classifications, but instead directly measures an applicant's experiences, viewpoints and commitments without regard to racial identity, it does not violate the equal protection clause.*

Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be [B]lack, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race.

—Justice Scalia in *City of Richmond v. J.A. Croson Co.*<sup>1</sup>

In recent years, race-conscious affirmative action programs have come under increasingly hostile attack. In 1996, California voters enacted Proposition 209, the "California Civil Rights Initiative," which prohibited the use of race-conscious procedures in education, employment and government contracting.<sup>2</sup> The referendum was part of a broader statewide effort to eliminate race-conscious affirmative action at all levels of government. Only a few months before the proposition passed, the Regents of the University of California system had adopted the "SP-1" admissions program, which prohibited the use of race in admissions decisions.<sup>3</sup>

Beyond California's borders, affirmative action opponents have also scored other successes. In Washington, voters passed a referendum similar to the one in California.<sup>4</sup> In Florida, Governor Jeb Bush signed an executive order precluding educational institutions from considering race in admissions.<sup>5</sup> In several court cases, challengers have also persuaded several federal courts to strike down race-conscious affirmative action programs, particularly those in graduate school admissions. Appellate courts in the

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1. 488 U.S. 469, 526 (1989) (Scalia, J., concurring).

2. See CAL. CONST. art. I, § 31.

3. See THE REGENTS OF THE UNIV. OF CAL., Policy Ensuring Equal Treatment: Admissions (SP-1) (July 20, 1995).

4. See WASH. REV. CODE ANN. § 49.60.400 (West Supp. 2000).

5. Florida Governor's Exec. Order 99-281.

Fifth and First Circuits have interpreted Title VI and the Fourteenth Amendment to prohibit using race as a factor in educational admissions.<sup>6</sup> Similarly, a federal court in Michigan recently has ruled that the University of Michigan's law school may not consider race as a factor in the admissions process.<sup>7</sup>

Not surprisingly, minority enrollments have dropped dramatically in those jurisdictions where race-conscious affirmative action is prohibited.<sup>8</sup> Responding to the change in admissions standards, institutions of higher learning are rapidly resegregating, particularly in the more prestigious flagship schools and top-ranked schools in several state school systems.<sup>9</sup>

But affirmative action supporters recently have had cause for some celebration. Unhappy with decreasing minority enrollments, several state legislatures—including Texas, Florida and California—have attempted to restore the benefits of diversity by automatically admitting a certain percentage of each high school's graduating class, regardless of the high school's relative prestige or reputation.<sup>10</sup> Although commentators disagree

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6. Of course, the most notable of these is *Hopwood v. Texas*, 78 F3d 932 (5th Cir. 1996) (prohibiting use of race-based affirmative action in law school). The most recent decision to be issued was in *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F3d 1234 (11th Cir. 2001) (holding that even if diversity were a compelling government interest, program awarding automatic point additions for racial identity was not narrowly tailored to achieve diversity). See also *Wessmann v. Gittens*, 160 F3d 790 (1st Cir. 1998) (prohibiting the use of race in admissions for prestigious public high school in Boston).

7. *Gutter v. Bollinger*, 137 F Supp 2d. 821 (E.D. Mich. 2001). The trial court ruled that diversity did not constitute a compelling interest, and that even if it did, the university's program was too amorphous and arbitrary, and thus was not narrowly tailored to achieve diversity. *Id.* at 848–49, 853.

8. See Darlene C. Goring, *Private Problem, Public Solution: Affirmative in Action the 21st Century*, 33 AKRON L. REV. 209, 213 n.13 (2000) (documenting decreases in several professional schools and undergraduate institutions); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2246–48 (2000) (noting that at Boalt Hall, enrollment for Black students dropped from 20 students in 1996, the last year before SP-1 took effect, to 7 students in 1999).

9. See William Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 LA RAZA L.J. (forthcoming 2001) (describing significant drops in minority enrollment in the University of California law schools and at the University of Texas law school). See also Adam Cohen, *When the Field Is Level: In California, Minority Students Are "Cascading" Out of Top Schools and Into the Second Tier. Is This Good for Them?*, TIME, July 5, 1999, at 30 (documenting that post-Proposition 209 minority enrollments decreased at more prestigious universities in U.C. System, including Berkeley and UCLA, but increased at U.C. Irvine, Santa Cruz and Riverside); Kenneth Weiss, *Fewer Blacks and Latinos Enroll at UC*, L.A. TIMES, May 21, 1998, at A3 (same).

10. According to 1997 Texas General Laws 155,

[e]ach general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated with a grade point average in the top 10 percent of the student's high school graduating class in one of the two school years preceding the

about whether these so-called "class-rank" programs ought to replace race-conscious affirmative action, the programs have produced some small gains in minority enrollments at some institutions.<sup>11</sup> Other state institutions have experimented with affirmative action based on class or economic need, albeit with limited success.<sup>12</sup>

More notably, federal appellate courts have begun to issue opinions upholding the constitutionality of race-conscious affirmative action. Finding that diversity constitutes a compelling government interest, a separate federal trial court in Michigan<sup>13</sup> and the federal Court of Appeals for the Ninth Circuit<sup>14</sup> both have upheld race-conscious affirmative action as a constitutionally permissible means of diversifying the classroom.

Most remarkably, the political tide also appears to be shifting in favor of race-conscious affirmative action. In the wake of significant turnover on the University of California Board of Regents, a newly-constituted board has voted to repeal the SP-1 affirmative action ban in admissions.<sup>15</sup> Moreover, an increasing number of schools are abandoning or modifying the use of standardized tests, largely because such tests disproportionately exclude applicants of color. In a move widely noted by the educational community, the president of the University of California system recently

academic year for which the applicant is applying for admission and the applicant graduated from a public or private high school in this state . . . .

TEX. EDUC. CODE ANN. § 51.803 (West 2001). California and Florida plans are quite similar: California admits the top 4 percent and Florida admits the top 20 percent of each senior class. See Jeffrey Selingo, *What States Aren't Saying About the "X-Percent Solution"*, CHRON. HIGHER EDUC., June 2, 2000, at A31, A32 (hereinafter Selingo, *X-Percent Solution*). To the extent that these plans are at all successful in boosting minority numbers, their success can be traced to the fact that the high schools are heavily segregated by race. *Id.* (outlining debate about class-rank programs, and documenting increases in minority enrollments at the University of Texas in undergraduate admissions). Thus, top achievers from high schools in segregated neighborhoods will gain automatic admission as easily as students from White high schools, even though the applicants of color might not have been admitted otherwise under previous policies.

11. See Selingo, *X-Percent Solution*, *supra* note 10.

12. See *infra* notes 32–38, 47–49 and accompanying text (discussing class-based and disadvantaged-based affirmative action alternatives respectively).

13. See *Gratz v. Bollinger*, 122 F Supp. 2d 811 (E.D. Mich. 2000). Unlike the district court in *Grutter*, the court in *Gratz* held that educational diversity constitutes a governmental interest sufficiently compelling to justify using race as part of the admissions process. *Id.* at 819–20.

14. See *Smith v. Univ. of Wash. Law Sch.*, 233 F3d 1188 (9th Cir. 2000) (finding that the use of race in an affirmative action program did not violate Title VI or the equal protection clause).

15. See Rebecca Trounson & Jill Leovy, *UC Regents Vote to Rescind Ban on Affirmative Action*, L.A. Times, May 17, 2001, at 1. But see Jeffrey Selingo, *U. of California Board May Revisit Ban on Affirmative Action in Admissions*, CHRON. HIGHER EDUC., Jan. 19, 2001, at A24 (noting that such a move would only have symbolic value because Proposition 209 would remain in place).

called for the elimination of the Scholastic Aptitude Test in the admissions process.<sup>16</sup> Likewise, the outgoing chancellor of the Florida university system has urged schools to place less emphasis on standardized test scores.<sup>17</sup> Indeed, several hundred colleges and universities already have abandoned the standardized test score as part of their admissions criteria.<sup>18</sup>

In the midst of such activity, it appears quite likely that at some point in the near future, the U.S. Supreme Court will decide whether race-conscious affirmative action violates federal or constitutional law.<sup>19</sup> Some court watchers predict that, given its current make-up, a closely divided Court will strike down race-conscious affirmative action programs as unconstitutional under the equal protection clause.<sup>20</sup> At the very least, a majority of the Court is likely to subject any race-conscious program to strict scrutiny, even if that scrutiny is not necessarily "fatal in fact."<sup>21</sup>

Judging from the Court's recent decisions, there is good reason to believe that the odds are against race-conscious affirmative action. In various opinions on affirmative action in employment and voter redistricting, the Court has looked with disfavor on the use of racial classifications as a means of remedying discrimination, although the Court has been closely divided along traditional political and ideological lines.<sup>22</sup>

If the Court strikes down the use of race-conscious affirmative action, law schools across the nation are likely to confront the same issue currently facing law schools in Texas, California and Washington. Namely, how can an institution pursue a commitment to remedying

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16. *The SAT Showdown*, NEWSWEEK, Mar. 5, 2001, at 48.

17. *Chancellor: Rely Less on SAT Tests*, FLA. SUN-SENTINEL, Feb. 28, 2001, at 1B.

18. *Id.* (noting that 300 colleges and universities do not rely on the SAT for admissions decisions).

19. See, e.g., Jo Ann Zuniga, *Focus: Equal Educational Opportunity for Hispanics*, HOUS. CHRON., Feb. 5, 2001, at 22 (Indiana University law professor Jorge Chapa predicts that the Court will soon take up the issue because of the split between the Courts of Appeal); see also Sara Hebel, *Courting a Place in Legal History*, CHRON. HIGHER EDUC., Nov. 24, 2000, at A23 (noting that Supreme Court decision on affirmative action is likely to come soon).

20. See, e.g., Zuniga, *supra* note 20, at 22 (reporting Chapa's prediction that the odds are against the Court upholding affirmative action).

21. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995). Justice O'Connor's original opinions in *Adarand* and *Croson* appear to express some sympathy to the idea of remedial racial classifications. For O'Connor, such preferences are not per se unconstitutional but might be upheld if they advance a compelling interest and were narrowly tailored. See Justin Schwartz, *A Not Quite Color-Blind Constitution: Racial Discrimination and Racial Preference in Justice O'Connor's "Newest" Equal Protection Jurisprudence*, 58 OHIO ST. L.J. 1055, 1080-84 (1997). O'Connor's later opinions in the redistricting cases appear to come closer to a decision that racial classifications in any context, with the exception of remedying past discrimination, are per se discrimination. See *id.* at 1093.

22. See *infra* notes 60-63, 77-89 and accompanying text.

discrimination, diversifying law school populations and providing resources for underserved communities, all without violating the Constitution? This essay proposes an alternative affirmative action program that does not rely on racial classifications to achieve important institutional goals. Rather, it proposes a program that directly measures an applicant's ability to further these institutional goals.

Under a "direct measures" program, an applicant would be granted an admissions preference if her application demonstrated that she met any of three criteria: (1) that she had suffered from the effects of racial discrimination; (2) that she likely would contribute an important and under-represented viewpoint to the classroom on issues of social and racial justice; and/or (3) that she likely would provide resources to underserved communities. The direct measures program would bypass using the proxy of racial identity for applicant experiences, viewpoints and commitments, to directly measure those attributes without any reference to a particular racial identity.

This program relies heavily on Justice Scalia's observation in the opening quote that a preference for identified victims of discrimination does not classify on the basis of race. Rather, the direct measures program classifies applicants directly on the basis of their traits, qualities, interests, viewpoints and commitments. Accordingly, I argue in this article that a direct measures program should not be subject to strict scrutiny.

Similarly, I argue that a direct measures program is not a pretext for racial classification favoring members of particular racial groups. To the contrary, I suggest that the direct measures program is consistent with the intent to pursue the legitimate goals of remedying discrimination, diversifying the classroom and providing services for the historically underserved. Although racial identity may historically have served as a very useful proxy for particular experiences, viewpoints and commitments, institutions nevertheless can bypass the use of that proxy in favor of more direct assessments of those qualifications.

Part I of this essay sets out in detail the direct measures affirmative action program. This section also compares the program to other alternative affirmative action program experiments undertaken by various educational institutions. In that regard, I argue that the direct measures program brings together in one program the best aspects of these various experiments.

Parts II and III discuss the constitutionality of a direct measures program. First, in Part II, I argue that the direct measures program does not constitute a racial classification, because the program operates without relying on racial identity as an admissions factor. In making that argument, I draw from Justice Scalia's declaration in *Croson* that programs targeting identified victims of racial discrimination do not constitute classifications based on race, so long as they do not rely on racial identity as a proxy to identify victims of discrimination. I also point out that the

Court has defined racial identity quite narrowly, to distinguish the social experiences and history associated with race from the immutable characteristics that constitute race per se. Accordingly, I argue that under the Court's own definitions, the direct measures program does not create classifications on the basis of this narrowly defined concept of racial identity.

In Part III, I anticipate and answer the argument that the direct measures program is designed to achieve a discriminatory purpose, namely, to implement a racial classification under the pretext of remedying discrimination. In response, I argue that the criteria used in the direct measures program is more consistent with a law school's intent to directly measure and assess applicants' experiences, viewpoints and commitments. Certainly, the fact that the program will admit White students who qualify under the requisite criteria demonstrates the intent to directly assess applicant characteristics, rather than an intent to classify on the basis of race for its own sake. Indeed, as this section points out, historical evidence indicates that law schools originally used race as a proxy in affirmative action programs for reasons of efficiency, in order to measure for certain experiences, viewpoints and commitments in an administratively efficient way. The direct measures program accomplishes the same goals without the use of race as a proxy.

Part IV explores the broader theoretical appeal of a direct measures program. This section notes that a direct measures program will encourage applicants and law school admissions committees to more fully describe applicants' experiences and histories of discrimination. These descriptions can contribute a great deal to the national conversation about the parameters of racial discrimination. In addition, the program is self-terminating, unlike conventional race-conscious affirmative action. Finally, such a program works "within the system," to create a set of preferences that are based not on racial identity but on the very things that the Court itself has said are not part of racial identity—historical experiences, viewpoints and commitments.

## I. A PROPOSAL: THE DIRECT MEASURES PROGRAM

### A. *Suggested Admissions Criteria*

I propose an admissions program that seeks directly to measure the qualities, characteristics, perspectives and commitments of an applicant with regard to a number of areas. In particular, the program would grant preferences based on those qualities, and not on the basis of racial identity. The program asks the admissions committee, and the applicant herself, to assess the candidate according to the following three categories of criteria and suggested descriptive subquestions within each category:



- (1) Has the applicant or applicant's family been subject to the effects of racial discrimination or race-related adversity, past or present, including but not limited to direct, institutional or societal discrimination on the basis of race?

Has the applicant been excluded from opportunities, resources or benefits on the basis of her racial identity? Discrimination can be direct and invidious, or more subtle and institutional. With regard to the latter, for example, has the applicant resided in neighborhoods that are segregated by race?<sup>23</sup> Has the applicant attended primary or secondary educational institutions, or institutions of higher learning, whose enrolled students are predominantly students of one race, and whose funding levels, teacher assignments, facilities, extracurricular activities and transportation resources are consistently below the national or regional average?<sup>24</sup>

More generally, will providing this applicant access to a legal education help to compensate for past and continuing racial discrimination against the applicant?

- (2) Will the applicant, based on her life experiences or her own ideas and thinking, contribute a perspective or viewpoint on issues of racial justice that is currently not well-represented in the student population?

Does the applicant have a set of life experiences that differ from those of the majority student population? Will the applicant likely draw on that set of experiences to contribute viewpoints on issues of racial or social justice that are not currently represented among the majority of the student population?<sup>25</sup>

Has the applicant developed alternative perspectives, ideas, viewpoints, interests, visions, and/or arguments about issues of racial justice that are not currently represented by the majority of the student population?

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23. For the argument that institutional and individual racism produces segregated neighborhoods, see generally Lawrence Bobo and Camille Zubrinsky, *Attitudes on Residential Integration: Perceived Status Differences, Mere In-Group Preference, or Racial Prejudice?*, 74 SOC. FORCES 883 (1996); Ruth Hoogland DeHoog, *Metropolitan Fragmentation and Suburban Ghettos: Some Empirical Observations on Institutional Racism*, 13 J. URB. AFF. 479 (1991).

24. See *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (holding that a segregated school includes racialized inequalities in the above-listed categories).

25. For the argument that backgrounds and life experiences can contribute to the development of unique viewpoints, see Akhil Amar and Neal Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1746 (1996).

- (3) Is the applicant likely to provide services or resources to communities that are legally underserved or disproportionately excluded by legal institutions?

Has the applicant developed a significant relationship with, or commitment to, local or national communities that have been underserved by legal institutions, or that have previously been underrepresented in political and legal institutions? Is the applicant likely to further that commitment or relationship in pursuing her educational activities, including the production of scholarship, activities in the classroom or institutional activities? Is the applicant likely to provide resources or services to the communities with which she has developed a relationship or commitment to serve?<sup>26</sup> Will a legal education help the applicant both to further develop that commitment or relationship, and to provide resources or services to those communities?

Administering a direct measures program undoubtedly will be both expensive and time-consuming for admissions committees, which will have to evaluate the entire applicant file including the personal statement. To avoid constitutional difficulty however, applications should in no way be pre-screened based on the racial identity of the applicants.

That is not to say that the admissions committee must hide from view the applicant's racial identity. Admissions committees constitutionally can be aware of an applicant's racial identity without relying on racial identity *per se* in evaluating whether to admit her under the direct measures program. The U.S. Supreme Court has found it wholly permissible for state legislatures to be aware of race when they draw redistricting lines so long as they do not intend to create a classification based on racial identity.<sup>27</sup> Likewise, admissions committees can be aware of an applicant's race when evaluating applicants in a direct measures program without relying on race to make a determination.

Finally, law schools' admissions committees may need to abandon the use of the Law School Admissions Test ("LSAT") altogether. This essay proposes, at the very least, law schools should rely on LSAT scores solely to pre-screen an initial set of applicants, to exclude those whose scores predict failure in the institution. The Law School Admissions Council itself warns schools that test scores are not sufficiently predictive to warrant drawing fine distinctions between applicants based on slightly

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26. The U.S. Supreme Court has held that, although there may be a correlation between race and willingness to provide resources to underserved communities, a more reliable way to select such applicants is to locate applicants, whatever their race, who have demonstrated a commitment to serving such communities. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978).

27. See *Shaw v. Reno*, 509 U.S. 630 (1993). See *infra* note 77 and accompanying text.

differing test scores.<sup>28</sup> Beyond a threshold screening function, schools should make no further use of standardized test scores, and in no event should they use test scores to draw distinctions between students for purposes of final selection.<sup>29</sup>

A full discussion of the LSAT suggestion would detract from the focus of this article. At the same time, it is important to understand the relationship between the LSAT's disproportionate impact on applicants of color, and the timing of the test's adoption at the turn of the century—during a period when excluding people of color from law school admission was routine and uncontroversial.<sup>30</sup> Given the test's disproportionate impact, its limited predictive value and questionable history, law schools should minimize, if not eliminate altogether, the LSAT's role in the admissions process.

### B. Experiments in Race-Neutral Affirmative Action

In many ways, the direct measures program draws on the most promising aspects of other race-neutral alternatives. Responding to the controversy over race-conscious affirmative action programs, various state governments and educational institutions have explored several types of alternatives to race-conscious preferences.<sup>31</sup> First, some law schools have

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28. Philip D. Shelton, *Executive Director's Report—The LSAT Median: So What?*, in LSAC, LAW SERVICES REPORT 3 (Mar./Apr. 1995) ("Just as a single point or two should be irrelevant when evaluating an individual applicant for admission, one or two point differentials in schools' 'medians' should not carry the significance it [sic] appears to have today."); see also William C. Kidder, *Portia Denied: Unmasking Gender Bias in the LSAT and its Relationship to Racial Diversity in Legal Education*, 12 YALE J. L. & FEMINISM 1, 21 n.92 (2000) (discussing LSAC warnings and recommendations with regard to the use of test scores).

29. See LANI GUINIER ET AL., *BECOMING GENTLEMEN* (1997).

There is in fact evidence of a performance differential for those who are admitted from the very, very bottom of the LSAT pool. For this reason, using the LSAT as an entry level floor (basically a pass/fail bar) may make sense. The problem is that the law school does not simply use the LSAT as if it were a blunt instrument separating the wheat from the chaff. It uses the LSAT as if incremental differences within a relatively wide band above the floor are meaningful, despite the fact that those incremental differences do not predict law school performance for most male or female Penn students.

*Id.* at 125 n.74. Cf. Catherine Pieronek, *Review of Lani Guinier's Becoming Gentlemen*, 25 J.C. & U.L. 627, 632 (1999) (questioning these statistics).

30. Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1478–91 (documenting the evolutionary history of the LSAT), 1492 (noting the LSAT's disproportionate impact on applicants of color) (1998).

31. See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2332–33 (2000). For an extended discussion of class-based affirmative

experimented with affirmative action based on economic need, and have given preferences to those applicants who can demonstrate financial hardship or economic disadvantage.<sup>32</sup> For example, in 1997, in an attempt to preserve diversity after the passage of Proposition 209, UCLA College of Law adopted a program based on economic need, as measured by a number of admissions criteria.<sup>33</sup> To date, the program has produced little in the way of results. Even with the program in place, Black enrollment at UCLA College of Law has dropped by 72%, and Latino/a enrollment by 26%.<sup>34</sup> Indeed, in the fall of 1999, only two Black students enrolled in the law school's entering class of 286 students.<sup>35</sup> Judging from these results, it would appear that class-based affirmative action has not fully captured the scope of disadvantage faced by applicants of color who have been victims of discrimination.

In fact, many scholars criticize class-based programs precisely because they do not address the unique socio-economic hardships suffered by victims of discrimination.<sup>36</sup> Professor Deborah Malamud points out that even when Black and White families enjoy the same middle-class status, Black families suffer relative economic disadvantage in several forms. For example, they are relatively subject to far more housing discrimination, attend schools that are less well-funded and are attended by more low-income students, and are more victimized by crime. They do not have the same access to good jobs or get paid equally for the same job. Likewise, they enjoy less income security, perform less well on standardized tests, and are less likely to transmit their middle-class status to the next generation.<sup>37</sup> Malamud argues that economic affirmative action does not take into account these racialized economic differences, and has

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action, see RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION* (1996).

32. See Forde-Mazrui, *supra* note 31, at 2332, 2389.

33. For a detailed empirical review of the UCLA School of Law's experiment with class-based admissions preferences, see Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997).

34. See Deborah C. Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 504 (1997).

35. See Jerome Karabel, *Affirmative Action Had Real Merit*, L.A. TIMES, July 10, 2000, at B7.

36. See, e.g., Deborah C. Malamud, *Affirmative Action, Diversity and the Middle Class*, 68 U. COLO. L. REV. 939, 967-87 (1997) (hereinafter Malamud, *Middle Class*); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997) (reviewing applicant data from law school admissions database, and concluding that affirmative action based on economic need would not preserve diversity); Tung Yin, *A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 235 (1997) (reviewing Kahlenberg, *supra* note 31).

37. See Malamud, *Middle Class*, *supra* note 36, at 939, 967-87 (1997).

failed to reflect the unique economic disadvantage produced by racial discrimination.<sup>38</sup>

Several institutions have also explored the use of programs based on class-rank—the so-called “X percent” programs—which admit a certain percentage of each high school’s graduates to the state’s university system.<sup>39</sup> Both the Texas and California legislatures have enacted legislation that automatically admits a certain percentage of each high school graduating class (Texas admits the top 10% and California the top 4%). Florida has enacted a similar plan to admit the top 20% of each class.<sup>40</sup>

Preliminary results from class-rank plans appear quite mixed. In combination with a dramatic outreach program targeting minority students, the “X percent” plan appears to have restored undergraduate minority enrollments at the University of Texas at Austin to pre-*Hopwood* levels.<sup>41</sup> California has not yet had the opportunity to assess the effect of its percentage plan on minority enrollment.<sup>42</sup> Although Florida’s percentage plan appears to have boosted minority enrollment somewhat, detractors point out both that overall enrollment has increased significantly, and that the plan did not take effect until July of 2000, well after the period during which most university freshmen were enrolled. Moreover, commentators point out that percentage plans do not operate in graduate and professional school admissions, and that in California, the percentage plan group of students admitted under the plan constitutes a very small portion of the overall admissions program.<sup>43</sup> In addition, class-rank plans are not likely to affect enrollments at the particularly elite institutions in California, namely because Latino/a and African American students have been steered or have “cascaded” to the lower-ranked state universities.<sup>44</sup>

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38. See *id.* at 969.

39. E.g. Selingo, *X-Percent Solution*, *supra* note 10, at A31; Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College*, CHRON. HIGHER EDUC., Aug. 4, 2000, at A48. Pennsylvania is considering whether to admit the top 15% of each high school graduating class, but the proposal has been put on hold temporarily. Patrick Healey, *Texas Plan for College Diversity Draws Fire*, Boston Globe, Aug. 22, 2000, at A1.

California is also considering a proposal to admit the top 12.5% of every class, provided that those in the bottom 8.5% of that group complete two years of community college with a 2.4 GPA. Susan Gembrowski, *UC Admissions Overhaul Could Lift Poor, Minorities*, S.D. UNION-TRIB., Sept. 22, 2000, at A1.

40. Rule 6C-6.002 F.A.C.; see Peter T. Kilborn, *Jeb Bush Roils Florida on Affirmative Action*, N.Y. TIMES, Feb. 4, 2000, at A1.

41. See Berry, *supra* note 39, at A48.

42. See Paul Attewell, *Merit, Testing and Opportunity*, AM. PROSPECT, Sept. 25, 2000, at 20 (pointing out that California’s percentage plan will not take effect until 2001).

43. See e.g. Berry, *supra* note 39, at A48.

44. See *id.*

Perhaps the largest problem with class-rank programs is their limited applicability. According to Thomas J. Kane, class-rank proposals only promote diversity in highly segregated states.<sup>45</sup> Accordingly, several states have rejected the use of a class-rank program because the state's high schools are insufficiently segregated by race, and will not achieve the goal of remedying discrimination or diversifying the classroom.<sup>46</sup>

Finally, institutions have considered the use of an adversity index, which contextualizes the applicant's success by considering whether the applicant has had to overcome difficult hardships, e.g., having a parent in prison or being the child of a gang member.<sup>47</sup> In Texas, Rice University considers an applicant's "diverse life experiences" and her success in overcoming hardship.<sup>48</sup> A small number of institutions, like the graduate school in education at U.C. Berkeley, consider an applicant's commitment and interest in issues of social justice or those issues related to race and ethnicity.<sup>49</sup> Results from these adversity-index programs have not been widely published to date.

These alternative programs, whether they are class-based or disadvantage-based, all have tried to capture some facet of the social disadvantage that historically has accompanied racial discrimination.<sup>50</sup>

45. See Healey, *supra* note 39, at A1.

46. According to observers, class-rank programs also encourage high schools to manipulate class-rank, and evidence suggests that high schools in segregated neighborhoods are more likely to experience difficulty in submitting class-rank information by the appropriate deadline. See Selingo, *X-Percent Solution*, *supra* note 10, at A32.

47. See Attewell, *supra* note 42, at 21 (discussing adversity indices); See also Forde-Mazrui, *supra* note 31, at 2232 n.7 (citing to Michelle Locke, In *Post-Affirmative-Action Era, Essays Allow Students to Get 'A' for Adversity*, SEATTLE TIMES, May 24, 1998, at A6 (describing recent University of California "post-affirmative-action" admissions program by which applicants write "hardship essays" in which they explain difficult circumstances they have faced "such as poverty, having a parent in prison, speaking English as a second language or having a physical disability" and stating that "[r]esponses ranged from deaths in the family to being the child of a gang member")); see also *id.* (stating that "[a]fter losing a court battle to use race as a factor in admissions, the [University of Texas] added a two-page statement on disadvantage to its application this year"); Wade Goodwyn, *Morning Edition: Texas Affirmative Action Debate* (National Public Radio broadcast, May 13, 1998) (explaining that after *Hopwood*, the University of Texas "tried to compensate in other ways" including asking applicants to write "essays about overcoming adversity" in which admissions officers look for certain "kind[s] of qualities in a minority student").

48. See Amanda Ripley, *Yes, Your Race Still Matters*, TIME, Oct. 23, 2000, at 77.

49. See Michal Lando, *Race Debate Continues in U.C.-Berkeley Graduate School Admissions*, U.WIRE, Sept. 5, 2000.

50. To date, none of these programs has been challenged in court as unconstitutional or in violation of a state law such as Proposition 209. Despite clear race-conscious intent to boost minority enrollment, state legislatures, university trustees or faculties have adopted these programs as part of an implicit compromise. These programs are allowed to compensate for post-affirmative action losses in exchange for the repeal of affirmative action. I will argue in the following section, however, that these programs may withstand legal challenges because they do not rely on racial classifications. See also Forde-Mazrui, *supra* note 31 (arguing that

Unfortunately, each of these programs addresses in piecemeal fashion only one or two aspects of that disadvantage, and for that reason, fails to capture the unique convergence of multiple hardships associated with racial discrimination.<sup>51</sup> In contrast, the proposal that I outline above attempts to capture that convergence, by creating a general category that directly asks whether the applicant has suffered the effects of racial discrimination, to include economic disadvantage, residential segregation or other discrimination-related adversities. Moreover, the direct measures program also seeks out applicants who themselves can work to remedy racial discrimination, much like the program adopted by the education school at U.C. Berkeley.

## II. DOES THE DIRECT MEASURES PROGRAM CREATE A RACIAL CLASSIFICATION?

Under modern equal protection jurisprudence, the constitutionality of a direct measures program will turn on two aspects of the program: (1) whether the program employs a racial classification; and (2) if the classification is not race-conscious on its face, whether the law school intended to create a racial classification. With regard to the first issue, this section argues that a direct measures program does not employ racial classifications, and instead relies on race-neutral criteria. The following section, Part III, argues that the program is not intended to serve a discriminatory purpose—i.e., to create a racial classification—but is designed to advance legitimate institutional goals in remedying past discrimination, diversifying law school classrooms and providing for historically underserved communities.

Plaintiffs challenging the direct measures program likely will argue that the first of the direct measures criteria—whether the applicant has experienced the effects of racial discrimination—creates an unconstitutional classification on the basis of racial identity. In particular, opponents are likely to claim that only those racial groups who historically have been subjected to racial discrimination will qualify under the program. They will argue that, because the program targets not all forms of discrimination but only discrimination on the basis of racial identity, the program thereby discriminates on the basis of race, because it will accord preferences only to those particular racial groups who historically have suffered from discrimination.

However, this essay argues that the discrimination-related preference is race-neutral. Although the preference focuses on the applicant's experi-

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race-neutral programs may pass constitutional muster despite the fact that they are intended to boost minority enrollment rates).

51. Anthony Alfieri refers to the "multiple physical and psychosocial aspects of racial injury." Anthony Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800, 804 (1996).

ence of discrimination, it does not at all focus on racial identity or require that the applicant belong to a particular racial group.

*A. Strict Scrutiny and the Intrinsic Harm of Racial Classifications*

In modern-era affirmative action jurisprudence, federal courts have disfavored race-conscious programs, not because they object to the goals of those programs, but because they find fault with the use of classifications based on race per se as the means to achieve those objectives. For example, in *Hopwood v. Texas*,<sup>52</sup> the Court of Appeals for the Fifth Circuit invalidated the law school's race-conscious program not because it disagreed with the law school's purpose of correcting prior racial discrimination. Indeed, the court found the goal to be "wholesome."<sup>53</sup> Rather, the court held that the use of a race-conscious means to achieve those ends was intrinsically problematic.<sup>54</sup>

Similarly, in the last decade, the Court has objected more to the means of race-conscious affirmative action—the racial classification—than to the various ends affirmative action serves. In particular, the Court has held that, whether remedial or invidious in nature, racial classifications cause three specific types of intrinsic injury. First, race-conscious preferences stigmatize people of color as unqualified or not deserving of selection "on their merits." Relying on ideas developed in *Regents of Univ. of Cal. v. Bakke*,<sup>55</sup> the Court held in *City of Richmond v. J.A. Croson*<sup>56</sup> that even benign racial classifications "carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."<sup>57</sup>

In the Court's view, this appears particularly true where race-conscious affirmative action programs depend for their operation on certain descriptive assumptions about people of color. According to Justice Thomas,

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52. 78 F.3d 932 (1996).

53. *Id.* at 934 ("The law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body.") (emphasis added).

54. *See id.*

55. 438 U.S. 265 (1978) (remedial classifications "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth").

56. 488 U.S. 469 (1989).

57. *Id.* at 493 (citing to *Bakke*, 438 U.S. at 298) (O'Connor, J., *et al.*); *see also* *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 229 (1995) (citing Justice Stevens' concurrence in *Croson*, 488 U.S. at 516–17) (remedial legislation "actually imposes a greater stigma on its supposed beneficiaries").



[s]o-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are entitled to preferences.<sup>58</sup>

Likewise, in Justice Stevens' view, remedial classifications may be "perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race."<sup>59</sup>

Second, and similarly, the Court argues that race-conscious affirmative action perpetuates consciousness of race and racial difference, and therefore impedes the move towards an ideal color-blind society in which skin color is irrelevant.<sup>60</sup> Particularly for Justice Scalia, race-conscious preferences seem counterproductive as a remedy for race discrimination. "The difficulty of overcoming the effects of past discrimination is nothing compared with the difficulty of eradicating from our society the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all."<sup>61</sup>

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58. *Adarand*, 515 U.S. at 241 (Thomas, J., concurring).

59. *Croson*, 488 U.S. at 517 (citing to *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980)).

60. See *Adarand*, 515 U.S. at 229 ("Because that perception [that beneficiaries of affirmative action are less qualified]—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor") (emphasis in original); see also *id.* at 239 (Scalia, J., concurring) ("To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.").

61. *Croson*, 488 U.S. at 520–21 (Scalia, J., concurring); see also *id.* at 495 (O'Connor, J., *et al.*) ("The dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race' ... will never be achieved."). See also *United Jewish Org. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977).

[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs. Furthermore, even preferential treatment may act to stigmatize its

Finally, and perhaps most importantly, the Court has argued that race-conscious affirmative action unfairly penalizes Whites, by foreclosing opportunities to them on the basis of a trait over which they have no voluntary control. In *Croson*, the Court found that “[t]he Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race. To whatever racial group these citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”<sup>62</sup>

Focusing on the rights of Whites who are theoretically displaced through race-conscious affirmative action, the Court has expressed concern about the potentially violent reaction of Whites who perceive that they have been denied an opportunity on the basis of their race. Justice Scalia in his concurrence warned that treating Whites unfairly could lead to racial hostility.

[E]ven benign racial quotas have victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race . . . . When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson or Croson burns.<sup>63</sup>

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recipient groups, for although intended to correct systemic or institutional inequities, such policy may imply to some the recipients’ inferiority and especial need for protection.

*Id.* at 173–74 (Brennan, J., concurring) (citation omitted).

62. *Croson*, 488 U.S. at 493; Justice Brennan indicated that:

[W]e cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most ‘discrete and insular’ of [W]hites often will be called upon to bear the immediate, direct costs of benign discrimination.

*Id.*

63. *Croson*, 488 U.S. at 527; see also *id.* at 493 (majority opinion mentions possible racial hostility deriving from stigma). Similarly, Justice Powell had focused on White reactions, in his opinion in *Bakke*. Race-conscious preferences

are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority.

*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 (1978) (Powell, J., concurring).

Thus, in the Court's view, because a classification based on race per se by its nature stigmatizes minorities, arouses race consciousness and unfairly penalizes a potentially resentful dominant class, the government must use classifications sparingly and only with very good reason.<sup>64</sup> Accordingly, a majority of the current Court subjects all such classifications—even remedial race-conscious affirmative action—to strict scrutiny.

*B. Is a Preference Targeting Discrimination  
Victims A Racial Classification?*

1. The Race Neutrality of Targeting Victims of Discrimination

This essay argues that a direct measures program would not be subject to strict scrutiny because it does not employ classifications based on race, nor does it create the sorts of harms the Court identified as associated with racial classifications. Rather, it relies on characteristics, qualities, abilities, perspectives and commitments that are race-neutral.

This is true even of the first criteria, which measures whether an applicant has experienced discrimination. In his concurrence in *Croson*, Justice Scalia made the point that granting preferences to applicants who have experienced racial discrimination does not constitute a preference on the basis of her racial identity. It is worth setting out his discussion of the matter at length:

A State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. And, of course, a State may 'undo the effects of past discrimination' in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected [B]lack applicant the job that, by reason of discrimination, had been awarded to a [W]hite applicant, even if this means terminating the latter's employment. In such a context, the [W]hite jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from

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64. See *Croson*, 488 U.S. at 493–94.

the system here, in which those to be disadvantaged are identified solely by race.

I agree with the Court's dictum that a fundamental distinction must be drawn between the effects of 'societal discrimination' and the effects of 'identified' discrimination, and that the situation would be different if Richmond's plan were 'tailored' to identify those particular bidders who 'suffered from the effects of past discrimination by the city or prime contractors.' In my view, however, the reason that would make a difference is not, as the Court states, that it would justify race-conscious action, but rather that it would enable race-neutral remediation. Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be [B]lack, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race.<sup>65</sup>

For Scalia, a program that targets victims of institution-specific racial discrimination does not constitute a racial classification, even if most of the beneficiaries are applicants of color. Specifically, Scalia notes that in such programs, applicants are classified not on the basis of their racial identity but on their historical experience of discrimination. Analogously, the direct measures program targets its recipients not on the basis of their racial identity but on their experience of discrimination.

Although Scalia reserves much of his approval for programs that target the disadvantaged *as such*, he also approves programs to compensate identified victims of state discrimination. To be sure, there is no theoretical reason to distinguish between programs that target general disadvantage and those that specifically target the disadvantage that accompanies racial discrimination. In both cases, the victims will have been selected not on the basis of their racial identity but on the basis of their experience of racial discrimination.<sup>66</sup> In fact, as Scalia's language suggests, the most narrowly-tailored program to remedy racial discrimination would be to target identified victims of racial discrimination. Requiring the program to consider other forms of disadvantage would make it vastly overinclusive, even if beneficial.<sup>67</sup>

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65. *Croson*, 488 U.S. at 526, 528 (Scalia, J., concurring).

66. *See id.* at 526.

67. Indeed, to the extent that a non-specific disadvantage program is adopted for the purpose of remedying discrimination, it is not narrowly tailored to accomplish its purpose. *See* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1787 (1996) (if designed to remedy past discrimination, race-neutral means that do not target victims of racial discrimination are not narrowly tailored to advance their goal). *See also Croson*, 488 U.S. at 506

By focusing on an applicant's experience of racial discrimination and not racial identity, the direct measures program draws on Justice Stevens suggestion in *Croson* that it would be "more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment."<sup>68</sup> A direct measures program identifies the experience of racial discrimination as a source of disadvantage that justifies differential treatment.

## 2. The Modern Court's Distinction Between Racial Identity and Associated Characteristics

It is very important to note that the program's focus on experiences, viewpoints and commitments—all of which may be correlated with race—does not convert the program's criteria into a classification based on race. Indeed, under modern equal protection jurisprudence, the U.S. Supreme Court has very narrowly defined racial identity—and correspondingly, classifications based on racial identity—to exclude classifications based on characteristics or experiences that historically have been strongly correlated, but are not immutably or necessarily tied to race.

Professor Neil Gotanda famously has pointed out that the Supreme Court's opinions in *Adarand* and *Croson* have defined race in a way that disassociates and separates racial identity from the historical experiences and social attributes that are strongly correlated to race.<sup>69</sup> Gotanda points out that in *Croson*, the Court's definition of race encompassed only those aspects of racial identity that the Court finds to be immutable: e.g., the color of a person's skin, his country of origin, his genetic relationship to an ethnically and physiognomically distinct sub-grouping of homo sapiens.<sup>70</sup>

In other cases, the Court expressly has distinguished between racial identity and these associated but not immutable characteristics that accompany particular racial identities. For example, in *Hernandez v. New York*, the Court held that a prosecutor's decision to strike Spanish-speaking prospective jurors constituted a race-neutral choice.<sup>71</sup> In that

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(O'Connor, J., et. al) (suggesting that the city program's decision to include Asians, Indians and other groups, without evidence that those groups had suffered from discrimination, betrayed the city's claimed remedial purpose).

68. See *Croson*, 488 U.S. at 514.

69. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

70. See *id.* at 28–30, 47–48; see also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 366–67 (1981) (defining racial identity per se as separate from experiences, tastes and aspirations historically associated with race).

71. See *Hernandez v. New York*, 500 U.S. 352, 360–61 (1991) (The Court accepted the argument that the Spanish-speaking jurors would not accept the official interpreter's translation without independently assessing the accuracy of the translation).

case, the Court defined race-neutral decisions as those “based on something other than the race” of the person in question.<sup>72</sup> The Court specifically rejected the argument that Spanish-speaking ability was sufficiently correlated with ethnicity or race to be the predicate for a classification based on race or ethnicity.<sup>73</sup>

Under the Court’s narrow definition, racial identity apparently does not include characteristics contingently or historically associated with race or ethnicity, if those characteristics are not intrinsically tied to racial identity.<sup>74</sup> This narrow definition follows closely from, and is largely driven by, the Court’s reasoning in the modern affirmative action cases. In the Court’s view as expressed in those cases, the central mistake of racism is stereotyping—using racial identity as a proxy for particular traits and characteristics that do not depend on racial identity, e.g., assuming that all Blacks are lazy when productivity is unrelated to racial identity.<sup>75</sup> Accordingly, the Court is compelled to distinguish between the immutable aspects of racial identity—e.g., skin color—and characteristics or traits that are theoretically independent of racial identity.

Under the Court’s relatively restricted definition of racial identity, the direct measures program does not create a classification based on racial identity. The program does not distinguish between applicants based on immutable characteristics like skin color, national origin or membership in a particular racial group. Rather, a direct measures program classifies applicants on the basis of experiences, viewpoints and commitments that historically have been correlated (but not immutably tied to) racial identity, like the ability to speak Spanish.

Indeed, the notion that the criteria operate independently of racial identity is well illustrated by the fact that a White applicant—perhaps a Cheryl Hopwood or an Alan Bakke—could in theory qualify for preferences.<sup>76</sup> As the next section will point out, in light of that fact, the race-neutral criteria used in the direct measures program are far more consistent with an intent to target for specific traits and characteristics than an intent to create a racial classification.

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72. See *id.* at 360.

73. See *id.* at 360–61.

74. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (holding that the standard of review will not vary to reflect differing social histories for differing racial groups—the standard does not depend on the race of those burdened or benefitted).

75. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (racial classifications are harmful because they reinforce racist stereotypes); see also Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990) (contrasting the conservative definition of racism as stereotyping with a more radical definition that would have called for the systematic redistribution of resources and opportunities along racial lines).

76. Both Cheryl Hopwood and Alan Bakke, plaintiffs in reverse discrimination cases to dismantle affirmative action programs, were White. See *Bakke*, 438 U.S. at 276; *Hopwood*, 78 F3d 937 n.8.

### III. DISCRIMINATORY PURPOSE: IS THE DIRECT MEASURES PROGRAM INTENDED TO CREATE A RACIAL CLASSIFICATION?

Although the direct measures program does not directly rely on racial identity, that fact will probably not insulate it from legal challenge. Indeed, because the program does not create a racial classification on its face, critics of such a proposal are likely also to challenge the program under the “discriminatory purpose” doctrine. In particular, opponents are likely to argue that a direct measures program is a pretext for a covert discriminatory purpose. More specifically, they likely will argue that the program is intended to create a set of preferences that will favor applicants of color in law school admissions despite its ostensibly race-neutral character.

However, as I will argue in this section, the direct measures program is designed not for the purpose of racial balancing, but rather to directly target race-neutral characteristics and traits for which racial identity formerly was used as a proxy. The criteria used in the program are more consistent with an intent to directly measure for desired characteristics.

#### A. Discriminatory Purpose and the Court's Redistricting Cases

Plaintiffs challenging a direct measures program likely would argue that the program is in fact intended to create an impermissible racial classification, and thus to achieve an impermissible discriminatory purpose. Such an argument is made easier by recent changes in the discriminatory purpose doctrine.

Generally speaking, to successfully challenge a facially race-neutral affirmative action program, plaintiffs must show that the legislature had the predominant motive of creating a racial classification.<sup>77</sup> It is not enough to show that the decision making body was conscious of racial identity or had thought about race in some general way. Nor does it suffice to demonstrate that the motive to classify on the basis of racial identity was one of several legislative motives.<sup>78</sup> In the Court's view, the constitutional wrong occurs when race becomes the “dominant and controlling” consideration.<sup>79</sup>

In recent redistricting opinions, the Court has significantly loosened requirements for a discriminatory purpose challenge. Previously, the Court had demanded evidence of invidious identity-based animus to sustain a discriminatory purpose challenge. In *Personnel Administrator of*

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77. See *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that awareness of race is permissible, and does not inevitably lead to impermissible race discrimination).

78. *Id.*

79. *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (referring to *Miller v. Johnson*, 515 U.S. 900, 915 (1995)).

*Massachusetts v. Feeney*,<sup>80</sup> the Court required proof that the government had chosen a course of action “at least in part ‘because of,’ not merely in spite of’ its *adverse* effects upon an identifiable group.”<sup>81</sup>

Under recent changes to the discriminatory purpose doctrine, however, it is now enough if challengers merely prove that the program was intended to create a racial classification.<sup>82</sup> In *Shaw v. Reno (Shaw I)*, the Court held that plaintiffs are no longer required to prove animus.<sup>83</sup> In that case, the Court addressed the constitutionality of a North Carolina legislative redistricting plan that had created an irregularly shaped district. In its opinion, the Court held that plaintiffs adequately had stated an equal protection claim by alleging that the district’s bizarre shape could be explained only on the grounds of race.<sup>84</sup>

The dissenters were quick to point out that plaintiffs had produced no evidence of invidious animus and that the redistricting plan did not dilute the voting power of the racial majority.<sup>85</sup> Relying on its reasoning in *Adarand* and *Croson*, the majority responded that strict scrutiny was warranted because race-conscious redistricting by its very nature reinforces racial stereotypes, undermines a system of representative democracy<sup>86</sup> arouses race consciousness, and balkanizes the country into racial factions.<sup>87</sup> Accordingly, the Court held that strict scrutiny applied to

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80. 442 U.S. 256 (1979).

81. *Id.* at 279 (emphasis added) (deciding to uphold a lifetime preference for state civil service employment to military veterans, despite its extreme disproportionate impact on women). *Cf.* *Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down Alabama constitution provision which disenfranchised voters convicted of moral turpitude because it was enacted with invidious animus against Blacks). In addition, the Court in *Feeney* held that statistical evidence of disproportionate impact on a particular group was not sufficient, by itself, to prove discriminatory animus. *Feeney*, 442 U.S. at 277.

82. For an excellent summary and commentary on the evolution of the redistricting cases, see T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1993).

83. See *Shaw v. Reno*, 509 U.S. 630 (1993).

84. See *id.*

85. *Id.* at 666–67 (White, J., dissenting) (no evidence of discriminatory purpose when Whites’ voting strength is not diluted).

86. In particular, the Court found that racial gerrymandering perpetuates impermissible stereotypes because it “reinforces the perception that members of the same racial group—regardless of their age, education, economic status or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.” *Id.* at 647. Moreover, it undermines democracy “by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.” *Id.* at 650.

87. “Even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society’s latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual’s worth or needs.” *Id.* at 643. The Court in *Shaw I* went on to find that, “even for remedial purposes, [racial gerrymandering] may balkanize us into competing racial



race-conscious redistricting, regardless of whether government had intended to disadvantage a particular racial group.<sup>88</sup> In particular, the Court found sufficient an allegation that the government had intended to racially gerrymander a district, and that race had been the predominant factor in the drawing of district lines.<sup>89</sup>

*B. Does the Direct Measures Program Have a Discriminatory Purpose?*

Relying on this recent doctrinal change, challengers could argue that a direct measures program should be subject to strict scrutiny because it is intended to grant preferences to applicants based on their race, and is designed to circumvent the ban on race-conscious affirmative action. Plaintiffs could argue that, like the irregular districting lines of the North Carolina plan, the unique and irregular combination of direct measures criteria is so unusual and irregular that the program cannot be explained as anything other than an attempt to create a racial preference.<sup>90</sup>

Moreover, plaintiffs could ask a court to take judicial notice of the historical timing of any law school's decision to adopt a direct measures affirmative action program.<sup>91</sup> Specifically, they might point out that the law school will have adopted the preferences in the wake of *Hopwood*, Proposition 209 and other legal prohibitions on race-conscious affirmative action. This argument would hold even more weight were it to be coupled with the argument that law schools have adopted alternative

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factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.” *Id.* at 657.

88. *Id.* at 644 (applying strict scrutiny where redistricting legislation is “so bizarre on its face that it is ‘unexplainable on grounds other than race’”) (citing to *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

89. See also *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (plaintiff must show only that race was predominant factor motivating legislature); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 905 (1996) (reaffirming standard in *Miller*); *Bush v. Vera*, 517 U.S. 952, 980–82 (1996) (plurality opinion holding that strict scrutiny applies only when all other legitimate redistricting principles are subordinated to race); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (facially neutral law warrants strict scrutiny if it can be proved that the law was motivated by a racial purpose or object).

90. See *Shaw I*, 509 U.S. at 644–47. “In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to ‘segregate . . . voters’ on the basis of race.” *Id.* at 646–47 (alteration in original).

91. Courts routinely consider the historical background of the decision in question, including the series of events that lead up to the decision in determining the purpose of government action. *E.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993) (noting that city officials imposed ordinance prohibiting ritual sacrifice of animals a few weeks after church announced its intent to locate in the city) (citing to *Arlington Heights*, 429 U.S. at 266–67).

affirmative action programs in response to pressure from minority groups, as a strategy to negotiate the racial politics that inevitably surrounds admissions processes.

1. Admitting White Applicants: Criteria Consistent  
with a Race-Neutral Purpose

Although a discriminatory purpose challenge to the direct measures program might prove quite formidable, law schools can rely on those same redistricting cases to mount an equally compelling response. Specifically, law school defendants can argue that the direct measures criteria is equally consistent, if not more consistent, with an intent to target specific race-neutral traits, characteristics and abilities in prospective law school students.

Under the Court's recent redistricting cases, the Court has refused to strike down a facially race-neutral program, where the criteria are consistent with a race-neutral purpose. In *Hunt v. Cromartie (Hunt II)*,<sup>92</sup> the Court addressed the constitutionality of a district that had been redrawn after the Court had struck down an earlier set of boundaries as unconstitutional. The Court noted that, while there was a strong correlation between the boundaries and racial demographics, the evidence also supported the conclusion that the new boundaries had been drawn to target solidly Democratic voters.<sup>93</sup> Noting the strong evidentiary correlation between voting behavior and racial identity, the Court framed the question as "whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior . . . ."<sup>94</sup> The Court went on to uphold the redistricting plan, pointing out that the plaintiffs had failed to prove that "race, rather than politics, predominantly accounts for the result."<sup>95</sup>

In *Hunt I*,<sup>96</sup> the Court took note of the fact that the plan captured White Democrats rather than Black voters who were not reliably Democrat voters. There, the Court pointed to evidence that, at the boundaries, district lines were drawn to capture voters who were likely to vote for Democratic candidates, even when those voters were white.<sup>97</sup> In ultimately upholding the program against a discriminatory purpose challenge, the Court relied heavily on expert conclusions that politics

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92. 121 S. Ct. 1452 (2001).

93. *Id.* at 1463–64.

94. *Id.* at 1466 (emphasis in original).

95. *Id.*

96. *Hunt v. Cromartie*, 526 U.S. 541 (1999).

97. *See id.* at 545.

constituted as good an explanation for the boundaries as an intent to racially balance.<sup>98</sup>

Similarly, law schools can argue that the program's "boundaries" are more consistent with legitimate institutional motives—to remedy discrimination, diversify the classroom and provide resources for underserved communities—than with a motive to create a racial classification. Most importantly, like the plan in *Hunt*, a direct measures program will admit White applicants who can demonstrate that they have experienced racial discrimination, that they offer a diverse viewpoint on racial justice not well-represented in the classroom, or that they are committed to providing resources to historically underserved communities. White students who can make a claim to any of these criteria will not be barred from qualifying for a preference under the program, and in fact will be eligible for the preference. Just as the program in *Hunt* preferred White Democrats to Black Republicans on the boundaries, the direct measures program prefers the White applicant who fulfill the relevant criteria to the Black applicant who does not.

Of course, as was also true in *Hunt II*, there undoubtedly will be a strong statistical correlation between particular racial identities and the applicant characteristics at issue—an experience of discrimination, a diverse viewpoint on issues of racial justice, and a willingness to serve areas that historically have been underserved. But the correlation does not render the program unconstitutional. As Justice O'Connor has noted with regard to racial redistricting, "[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify."<sup>99</sup> Similarly, if the criteria used in the direct measures program strongly correlate with race because they are drawn on the basis of traits or characteristics or commitments that historically (but not immutably) correlate with race, there is no evidence of an intent to create a racial classification.

As *Hunt II* demonstrates, it is perfectly permissible, even encouraged, for governments to design programs that more directly measure the attributes for which race has conventionally served as proxy. In *Hunt II*, the North Carolina legislature redrew district boundaries based on political behavior immediately after the Supreme Court had struck down earlier boundaries as unconstitutional racial classifications. It was this revised program that the Supreme Court ultimately upheld as constitutional, despite the plan's history and the strong correlation between the boundary lines and the racial composition of the district. Likewise, the direct measures program is meant to replace race-conscious affirma-

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98. *Hunt II*, 121 S. Ct. at 1463–64.

99. *Bush v. Vera*, 517 U.S. 952, 968 (1996) (O'Connor, J., principal opinion).

tive action programs, and will be adopted to more directly pursue the objectives advanced by race-conscious programs.

## 2. Historical Motives for Race-Conscious Affirmative Action

Although opponents might argue that race-conscious affirmative action is designed to achieve nothing more than pure racial balancing, historical evidence demonstrates, to the contrary, that such programs originally were adopted as an administratively efficient, inexpensive and pragmatic way to remedy the effects of discrimination. Tracing the evolutionary history of affirmative action, Professor John D. Skrentny has argued that the federal government embraced racial classifications as a pragmatic means of complying with the dictates of the new civil rights legislation passed in the 1960s.<sup>100</sup> Skrentny notes that, in spite of the faith that civil rights groups had put in the notion of colorblindness,<sup>101</sup> federal agencies subsequently encountered problems when attempting to press discrimination claims under the colorblind model.<sup>102</sup> Among other difficulties, the EEOC found it difficult to provide direct evidence of intentional discrimination, and as a result, prosecutions under the intentional discrimination model yielded poor results.<sup>103</sup> In addition, agencies confronted many bureaucratic difficulties when monitoring, investigating and processing discrimination cases.<sup>104</sup> Because individualized monitoring of employers and contractors would have been prohibitively expensive,<sup>105</sup> government agencies began to focus on disparities in the racial composition of the workforce, and to encourage preferences in employment and promotion as a way of reducing those disparities.<sup>106</sup> Thus, according to Skrentny, administrators turned to race-conscious classifications not to racially balance, but to ensure that their efforts produced visible results.<sup>107</sup>

Similarly, law schools appear to have been motivated by the desire for efficiency when making their initial decisions to adopt race-conscious affirmative action programs. The history of affirmative action

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100. See JOHN D. SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE AND JUSTICE IN AMERICA* 111 (1996). Skrentny also suggests that the government acted to produce quick results in part because the government faced the rising threat of social unrest. See *id.*

101. *Id.* at 113.

102. *Id.* at 115, 118–20.

103. *Id.*

104. *Id.* at 123, 134.

105. *Id.* at 142.

106. *Id.* at 114–20, 127–32.

107. “In the early 1950s, this technical logic of administrative pragmatism led to a simple conclusion: Choose race consciousness and effectiveness, or choose color blindness and failure.” *Id.* at 117.

at the University of Texas at Austin School of Law is perhaps not atypical of public law schools. In the late 1960s, the U.T. law school adopted its first affirmative action program to recruit applicants of color out of its CLEO (Continuing Legal Education Opportunity) program.<sup>108</sup> Dissatisfied with the results, the law school terminated the CLEO program. In the early 1970s, U.T. created a separate committee to review the applications of disadvantaged individuals, primarily targeting (but not limited to) applicants of color.<sup>109</sup>

Administrators justified a separate committee on two grounds. First, the university had an obligation to train a reasonably representative cross-section of the population.<sup>110</sup> Second, the applicants' predictive index (made up of test scores and grades) "did not adequately account for an applicant's ability to overcome past economic, cultural, and discriminatory practices."<sup>111</sup>

In 1980, out of concern for fairness to non-minority students, the law school asked the separate subcommittee solely to review minority files.<sup>112</sup> In 1992, the law school significantly revised its affirmative action program for reasons relating primarily to "administrative efficiency."<sup>113</sup> In particular, the law school vested a sub-committee of the full admissions committee with authority to review minority files, and subsequently to recommend a sufficient number of applicants to enroll a certain target percentage of Black and Mexican-American students.<sup>114</sup> In its 1992 Statement of Policy on Affirmative Action,<sup>115</sup> the law school outlined the three primary objectives of this affirmative action program: (1) to provide first-class training for future state bench and bar mem-

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108. Hopwood v. Texas, 861 F.Supp. 551, 557 (W.D.Tex. 1994).

109. *Id.* at 558.

110. *Id.* at 558 n.12.

111. *Id.* Before settling on this remedy, the law school tried several different formulations of committee responsibility. *Id.* at 558.

112. *See id.* at 558.

113. When reviewing the evolution of Texas law school's affirmative action policy, the court indicated that

as the pool of minority candidates improved, the focus of the meetings shifted to choosing among minority candidates that the committee knew, based on their TIs, (Texas Index, the law school's predictive index) could succeed in law school. Therefore, less full committee review of each individual file became necessary. Ultimately, the admissions committee determined that the process was inefficient and not the most effective way of processing minority applicants.

*Id.* at 560 (citations omitted).

114. *Id.* The full committee did not conduct their own review of these files, but only decided how many recommended applicants would receive offers of admission. *Id.*

115. *Id.* at 569.

bers;<sup>116</sup> (2) to redress prior discrimination against Blacks and Mexican-Americans;<sup>117</sup> and (3) to diversify the law school population in order to improve education.<sup>118</sup>

This historical account suggests that administrators relied on racial identity as an administratively efficient proxy in order to remedy prior discrimination and diversify the law school population. Like so many other institutions of the time, the law school used racial classifications not as ends in themselves, or to pursue "outright racial balancing."<sup>119</sup> Rather, they used race indirectly to achieve other objectives—to advance the mission of the law school to train future leaders, to remedy the effects of prior discrimination and to diversify the law school population for educational purposes. Moreover, there is every reason to believe that law schools adopting the direct measures program will do so for the same sorts of legitimate reasons that motivated them to adopt the original race-conscious programs.

The fact that law schools may adopt a direct measures program in order to achieve the same legitimate goals as race-conscious affirmative action does not render the program unconstitutional. As Kim Forde-Mazrui has explained:

Standing alone, the adoption of race-neutral policies in lieu of impermissible racial preferences to achieve the same objectives need not mean the program is a subterfuge for illegitimate purposes. If the objectionable nature of a racial

116. *Id.* at 570. ("To achieve the School of Law's mission of providing a first class legal education to future leaders of the bench and bar of the state by offering real opportunities for admission to members of the two largest minority groups in Texas, Mexican Americans and African Americans . . .")

117. The law school offered the following as compelling justifications in its "Statement of Policy on Affirmative Action:"

To assist in redressing the decades of educational discrimination to which African Americans and Mexican Americans have been subjected in the public school systems of the State of Texas; To achieve compliance with the 1983 consent decree entered with the Office of Civil Rights of the Department of Education imposing specific requirement for increased efforts to recruit AfricanAmerican and Mexican American students . . . .

118. Also in the law schools "Statement of Policy on Affirmative Action":

To achieve the diversity of background and experience in its student population essential to prepare students for the real world functioning of the law in our diverse nation . . . [T]o achieve compliance with the American Bar Association and the American Association of Law Schools standards of commitment to pluralist diversity in the law school's student population.

*Id.*

119. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

preference-based program relates to its means and not its purpose, then the replacement of those means with race-neutral criteria cures the objection.<sup>120</sup>

Accordingly, law schools need not deny their more recent history with regard to the timing of a direct measures program. It is desirable, not impermissible, for institutions to revise their policies to conform to recent Court pronouncements or in anticipation of a Court decision on a matter of constitutional importance. Indeed, law schools should well be expected, in light of the Court's continuing difficulty with racial classifications as a means, to search for a constitutional race-neutral means to remedy the effects of discrimination.<sup>121</sup>

#### IV. ADVANTAGES OF THE DIRECT MEASURES ALTERNATIVE

Beyond satisfying its direct objectives—remediating discrimination, diversifying the law school and providing for the underserved—a direct measures program also contributes a great deal to the conversation about race. This section discusses three aspects of the program's rhetorical (and practical) appeal. First, the direct measures criteria encourages racial communities and law school admissions committees to fully describe those social experiences and histories that are correlated to racial discrimination. An applicant who wishes to qualify for the admissions preference must describe the types of disadvantage she has suffered in connection with racial discrimination.<sup>122</sup> These detailed stories, which communicate the continuing harm of discrimination to law schools and the larger legal community, are valuable contributions to the public conversation about race.<sup>123</sup>

In addition, law school admissions committees, and presumably the larger law school community, likely will have important and difficult conversations about what types of institutionalized disadvantage "counts" as racial discrimination, and what types of discrimination the committee finds particularly compelling.<sup>124</sup> For example, schools will have to deter-

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120. Forde-Mazrui, *supra* note 31, at 2390.

121. *See id.*

122. *See Croson*, 488 U.S. at 515 (Stevens, J., concurring) ("I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment.")

123. *See* RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* 192 (1989) (describing the value of "detailed descriptions of particular varieties of pain and humiliation" as a means of communicating the injury of oppression to a privileged majority).

124. For an excellent discussion of institutionalized discrimination, see Ian Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (arguing that racist institutional practices become embedded in

mine whether to grant a preference to students who grew up in residentially segregated neighborhoods but who attended an expensive private school paid for by relatively wealthy grandparents. Similarly, applicants and the law school community will be asked to consider the ways in which Whites might have suffered from racial discrimination, or the ways in which some communities of color discriminate against each other. Together with applicants' stories, the arguments that develop within and outside of law schools in connection with a "direct measures" program will contribute to what Frank Michelman calls republican jurisgenerative political conversation.<sup>125</sup> That is, such a conversation will help to build a public fund of normative references, including narratives, analogies and other expressions of political commitment, from which people can draw to engage in dialogues about constitutional values, equal protection and affirmative action.<sup>126</sup>

In addition to its rhetorical appeal, the direct measures program provides the practical advantage that it is self-terminating.<sup>127</sup> Law schools will no longer be able to grant preferences when students can no longer qualify under the relevant criteria. Specifically, the program will terminate when applicants can no longer claim to suffer the effects of racial discrimination, when all viewpoints are well represented in the law school classroom, and when no community is systematically unable to obtain legal resources and services. Again, law school communities will have to engage in conversations about whether the time has come to terminate such a program. Indeed, the essays and applications of prospective students might serve as useful indicators or markers of the state of discrimination, as they will reflect progress (or the lack thereof) in the struggle to remedy the effects of past discrimination.

Finally, and perhaps most controversially, the direct measures program is rhetorically appealing because it works "within the system." Namely, it takes full advantage—rightful advantage, some would say—of the Court's quite narrow definition of racial identity to create a set of preferences that are race-neutral. In this way, the direct measures program constitutes an example of radical pragmatism—using the master's tools to dismantle the master's house.

Equal protection law might well have understood racism far differently, and defined the concept of racial identity more broadly. Namely, antidiscrimination law might have targeted not just intentional irrational

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institutional structures in a way that permits their reproduction without conscious intent to discriminate).

125. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1513–15 (1988).

126. *Id.*

127. The fact that the program self-terminates is a further indication that it is narrowly tailored to remedy prior discrimination. See *Adarand*, 515 U.S. at 237–38 (in assessing narrow tailoring, the trial court should consider "whether program [is] appropriately limited [so as] 'not to last longer than the discriminatory effects it is designed to eliminate'").



acts based on stereotypes but also the historical creation of a social system that systematically has subordinated communities of color and created a perpetual underclass along racial lines.<sup>128</sup> Under this alternative view, racial identity might have included the contingent historical experiences, social disadvantage and systematic subordination that have come to be strongly correlated with race.

Under that progressive view, the Court in *Hernandez v. New York* might have held that the exclusion of jurors based on their ability to speak Spanish constituted racial discrimination. Similarly, the Court might have differentiated invidious discrimination from remedial affirmative action on the basis of different historical experiences associated with racial identities. However, given that the Court has chosen the narrower view of racism and racial identity, it appears legitimate to insist that institutions be permitted to target that part of social experience and history that the Court has defined as unconnected to racial identity.

As Justice Scalia rightly observed in *Croson*, “[i]t is plainly true that in our society Blacks have suffered discrimination immeasurably greater than any directed at other groups.”<sup>129</sup> A direct measures program, which directly addresses discrimination without relying on racial classifications, is one constitutionally permissible step towards compensation for victims from that group and every other racial group that has suffered the injuries of discrimination.

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128. See Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054–55 (1978) (describing broader view of discrimination as systematic material subordination of people of color).

129. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989).